

The Honorable Barbara J. Rothstein

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

BOFI FEDERAL BANK, a federally chartered
banking institution,

Plaintiff,

v.

ADVANCE FUNDING LLC; KIRK A. TOVEY,
individually and as trustee of the KIRK A. TOVEY
REVOCABLE TRUST; and SETTLEMENT
COLLECTION SERVICE, LLC,

Defendants.

NO. 2:14-cv-00484-BJR

**DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT OF
DISMISSAL**

**Note on Motion Calendar:
Friday, October 12, 2018**

ORAL ARGUMENT REQUESTED

I. RELIEF REQUESTED

Pursuant to Fed. R. Civ. P. 56, Defendants move to dismiss Plaintiff's Complaint. The undisputed evidence in this case has established that Sheena Venzant voluntarily cancelled her arrangement with BOFI Federal Bank ("BOFI") months before entering into a new assignment contract with Advance Funding LLC ("Advance Funding"). As a matter of law, BOFI cannot sustain a tortious interference claim, and once the interference claim is dismissed, there is no basis to sustain the remaining claims for unjust enrichment and declaratory relief.

II. OVERVIEW

This case concerns the assignment of future lottery payments originally won by Sheena Venzant (“Ms. Venzant”). In 1997, the Legislature enacted laws establishing the process and procedure by which lottery prizes in the State of Washington may be assigned. RCW Ch. 67.70.

BOFI’s tortious interference claim was previously dismissed on the grounds that BOFI did not have an enforceable contract since it had failed to comply with the statutory requirements governing lottery assignments. [Dkt. 42.] The collateral claims were also dismissed. [Dkt. 63.] BOFI appealed and the case is now back before this Court. In the interim, Advance Funding became financially incapable of proceeding and instructed counsel to withdraw. [Dkt. 96.] The remaining Defendants, Settlement Collection Service, LLC (“SCS”) and Kirk Tovey individually and the Kirk A. Tovey Revocable Trust (the “Trust” or collectively “Tovey”) continue to actively defend the claims and bring this motion.

III. STATEMENT OF ISSUES

1. Where the Plaintiff cannot establish material elements of the tortious interference claim as a matter of law, should the Complaint be dismissed?

2. Should the unjust enrichment claim be dismissed where there was no benefit conferred and no wrongful or unjust act?

3. Should the request for declaratory relief be denied on the grounds that this Court lacks the power to undo a lawfully issued State Court Order pertaining to an issue of state statutory law?

IV. EVIDENCE RELIED UPON

This Motion is based on the previously filed Declaration of Sheena Venzant and exhibits thereto [Dkt. 30] and the Declaration of Dan Cevallos [Dkt. 31], the Declaration of Richard E. Miller, III, In Support of Motion for Summary Judgment (“Miller Decl.”), the

1 Declaration of Susan Fox, with exhibits and excerpts from the SCS 30(b)(6) deposition (the
2 “SCS Dep.), attached as Exhibit 13, and the Trust 30(b)(6) deposition (the “Trust Dep.”),
3 attached as Exhibit 14, appended thereto (“Fox Decl.”), and the records and files herein.

4 **V. STATEMENT OF FACTS**

5 On November 16, 2011, Ms. Venzant won the Washington State “Lucky for Life”
6 lottery drawing, payable in annual installments of \$52,000.00, which continue for the life of
7 the lottery winner. [Dkt. 1, at 3.1; Dkt. 30.] The “Lucky for Life” game is administered
8 through the Washington State Lottery Commission and is subject to RCW Ch. 67.70.

9 BOFI alleges (and Defendants accept for purposes of this motion only) that on
10 March 7, 2012, Ms. Venzant agreed to assign certain of her future lottery installment
11 payments, referred to in the Complaint as the “BOFI Agreement.” [Dkt. 30, Ex. A.] In return
12 for allegedly agreeing to transfer \$1,175,000.00 worth of future lottery installments,
13 Ms. Venzant was to receive \$318,401.75. *Id.*

14 The BOFI Agreement specified that the assignment “**may only** be made pursuant to an
15 order (a “Court Order”) of the Superior Court of Washington...” *Id. (emphasis added)*
16 Further, the BOFI Agreement set, as a defined condition precedent, that (i) the “Court Order
17 shall have been issued as a final and non-appealable order,” and (ii) that a written
18 acknowledgment of the Court Order from the Washington Lottery Commission (the “Lottery
19 Letter”) was required. *Id.* Closing of the transaction was contingent upon “satisfaction of all
20 of the foregoing conditions.” *Id.* The Terms Rider addendum to the BOFI Agreement also
21 expressly states that closing and funding of the transaction “is expressly contingent upon entry
22 of a Court Order, as described in section 6(f) of the Purchase Agreement.” *Id.*

23 It is undisputed in this case that BOFI:

- 24 • Never filed pleadings to seek Court approval of the proposed transfer;
- 25
- 26

- 1 • Never obtained a “final and unappealable” Court Order authorizing the
- 2 transfer;
- 3 • Never notified the Lottery Commission of the proposed transfer;
- 4 • Never notified the Attorney General’s office of the proposed transfer;
- 5 • Never received a written acknowledgment of the Court Order from the Lottery
- 6 Commission; and
- 7 • Never paid Ms. Venzant, or any one, the promised purchase price.

8 Instead of going to Court to get the assignment approved, BOFI spent the next several
 9 months trying to get insurance coverage because the lottery payments were life contingent.
 10 By August 1, 2012, BOFI knew that a two-year contestability period would be required by the
 11 insurance company, causing the need to restructure the Venzant deal and delay funding to Ms.
 12 Venzant. (Fox Decl., Ex. 1.)

13 Meanwhile, Ms. Venzant was already in financial distress. On August 21, 2012,
 14 Ms. Venzant pleaded with McLloyd Onwubere, her BOFI representative: “please help help
 15 help . . . i am in need really bad . . . uggh I am so stressed that I am not even approachable at
 16 this moment.” (Fox Decl., Ex. 2.) Mr. Onwubere reported that he believed Ms. Venzant
 17 would agree to a revised contract but that she would certainly need an additional advance of
 18 funds. (Fox Decl., Ex. 3.)

19 On August 25, 2012, Ms. Venzant once again told BOFI of her dire financial situation:
 20 behind on her rent and facing a possible eviction; vehicle tabs due; school supplies for her
 21 kids needed. “Please help me.” (Fox Decl., Ex. 4.) Unable to wait much longer,
 22 Ms. Venzant acquiesced to the concept of a funding postponement, in return for a \$25,000.00
 23 cash advance. (Fox Decl., Ex 5.) However, there is no evidence that the BOFI Agreement
 24 was ever amended to reflect the delay and no evidence of any additional payment to
 25 Ms. Venzant.

1 After all the back and forth and nearly a year of waiting to receive the promised lump
 2 sum payment from BOFI, it is no wonder that Ms. Venzant - the "Stressed Single Mom" - was
 3 finally done. She was unhappy and frustrated with BOFI's lack of action and the interminable
 4 delay, and was ready to move on with her life. [Dkt. 30.] Ms. Venzant expressed her
 5 frustration to Mr. Onwubere and openly discussed her desire to cancel the BOFI Agreement.
 6 On February 5, 2013, Mr. Onwubere told Ms. Venzant exactly what she needed to do to
 7 cancel the transaction.

8
 9 From: **McLloyd Onwubere** <mclloydo@gmail.com>
 Date: Tue, Feb 5, 2013 at 2:54 PM
 Subject: Following Up
 To: Sheena Venzant <sheshe0523@gmail.com>

11
 12 Sheena - I am glad we touched base. I felt I need to speak to you and have you move
 on with your life in the right way.

13
 14 So here is what you need to do. You need to cancel with the bank and your the
 insurance company. I have attached your contract, advance document (\$15k), and
 insurance policy information.

15
 16 Let's talk after you have a chance to review.

17
 18 In the letter to the bank and the insurance company you should say the following:

19
 20 FOR BANK
 To Whom It May Concern:

I am writing this letter to cancel my lottery payment assignment to BOFI Federal
 Bank and my current life insurance policy that names the bank as beneficiary of my
 life insurance policy. Due to family and financial reasons, I need to cancel my
 contract and transaction immediately.

21 [Dkt. 30, Ex. B.] That same day, Ms. Venzant wrote the following letter and cancelled the
 22 BOFI Agreement:

23
 24 **2/5/13**

To Whom this may concern;

25
 26 ***I am writing this letter to cancel my lottery payment assignment to BOFI
 Federal Bank and my current life insurance policy that names the bank as***

1 *beneficiary of my life insurance policy. Due to family and financial reasons, I need*
 2 *to cancel my contract and transaction immediately.*

3 *I will pay back all monies owed to the bank which include my \$15,000*
 4 *advance and the \$3,308.00 insurance premium.*

5 *Thanks*
 6 *Sheena Venzant*

7 [Dkt. 30, Ex. C.]

8 Mr. Onwubere is not now, and never has been an employee of, or agent for Advance
 9 Funding or the Defendants. [Dkt. 31]; (Miller Decl., ¶12). Prior to cancelling the BOFI
 10 Agreement, Ms. Venzant did not consult with, and no one from, or on behalf of Advance
 11 Funding or the Defendants tried to persuade her to cancel with BOFI. [Dkt. 30, ¶9.]

12 After cancelling the BOFI Agreement, Ms. Venzant did not initially pursue another
 13 assignment opportunity. However, several months later, Ms. Venzant contacted Barbara
 14 Guerra, an account representative of Advance Funding. [Dkt. 30, ¶8.] During the
 15 negotiations, Ms. Venzant told Advance that she had previously had a contract with BOFI but
 16 that she had terminated the BOFI Agreement by a formal letter. (Fox Decl., Ex 6.)
 17 Ms. Venzant faxed a copy of the cancellation letter to Advance Funding from her work
 18 address. (Fox Decl., Ex. 7.) Advance also conducted a search of court records, looking for
 19 any petition or court order concerning Ms. Venzant. Finding none, Advance was satisfied that
 20 Ms. Venzant had terminated the BOFI Agreement and that BOFI had never obtained the
 21 required Court Order or Lottery Letter needed to assign Ms. Venzant's lottery payments.
 22 (Miller Decl.)

23 On May 17, 2013, Ms. Venzant entered into an assignment transaction with Advance
 24 Funding. [Dkt. 31, ¶3.] Having secured the Assignment Agreement, Advance Funding then
 25 contacted various potential investors, including SCS, to determine if it was interested in
 26 acquiring the income stream for itself or on behalf of an SCS client. SCS is in the business of
 purchasing income streams as investment opportunities for clients. (SCS Dep., 25:3-9.)

1 On May 21, 2013, SCS received an offer to bid for the income stream. (SCS Dep.,
2 51:4-24.) As was typical of transactions with Advance Funding, SCS was only provided the
3 bare details of the transaction: the number and amount of payments assigned; the length of the
4 assignment; and the state of origin. (SCS Dep., 37:17-24; Fox Decl., Ex. 8.) At that point,
5 SCS was not given any details about the individual lottery winner, including the winner's
6 name. *Id.* SCS submitted a bid to acquire the income stream for its client, the Kirk A. Tovey
7 Revocable Trust.

8 After accepting the SCS bid, Advance Funding filed a petition in Thurston County
9 Superior Court. The Court granted the petition and approved the transfer from Venzant to
10 Advance Funding and the assignment from Advance Funding to the Tovey Trust. The Order
11 is dated June 6, 2013. (Fox Decl., Ex. 12.)

12 After obtaining the Order, Advance Funding sent SCS a closing binder which
13 contained all of the information and pleadings relevant to the transaction. (Miller Decl.) This
14 was the first time SCS was made aware of Ms. Venzant's name. *Id.* The closing binder was
15 reviewed and approved by SCS counsel and the deal closed. (Miller Decl. at ¶9.) Thereafter,
16 Ms. Venzant finally received her lump sum payment. [Dkt. 30, ¶10.]

17 At no point in the entire transaction was there ever any communication between SCS
18 and Ms. Venzant. No one at SCS was even aware of Ms. Venzant's name until after she had
19 signed the Transfer Agreement with Advance Funding and Court Order had been obtained
20 and closing binder delivered. (Miller Decl., ¶11.)

21 Neither the Trust nor Mr. Tovey had any contact. The Trust relies on SCS to
22 recommend potential opportunities. (Trust Dep., 28:22-25 – 29:1-4.) Neither the Trust nor
23 Mr. Tovey had any knowledge of or contact with Advance Funding, Sheena Venzant, or
24 BOFI. (Trust Dep., 8:1-12; 12:5-19; 17:19-25 – 18:1-4; 34:14-18.)

25 Ten months later on February 12, 2014, a new BOFI representative, Chris Husong,
26 attempted to contact Ms. Venzant. Ms. Venzant was understandably confused and irritated:

1 “I do not appreciate you calling my work at all. . . .I have not heard from you in months.”
 2 (Fox Decl., Ex. 9.) Mr. Husong claimed he had sent gift cards (which Ms. Venzant never
 3 received) and offered to send an advance of money and a cellular phone. Ms. Venzant flatly
 4 declined and told BOFI: “No I do not want a cell phone.” And 22 minutes later: “I don’t
 5 want deposit of any money . . . nor gift cards. . . .You should have received a letter from me
 6 months ago.” (Fox Decl., Ex. 10.)

7 On February 19, 2014, Venzant was unequivocal when she wrote:

8 I have no clue why you are trying to contact me. I mailed a cancellation letter
 9 to you [BOFI] a while back bout a year ago. The transaction has been
 10 cancelled a long time ago. would [*sic*] you like for me to send you another
 11 copy of this letter? I did keep the original just in case this happen [*sic*] that
 12 you say that you were not aware of any letter. Also I thought the well being of
 13 me and the deal that I had worked out back when Mccloyd [*sic*] was there had
 14 been no longer a deal especially when I started getting letters from the
 15 insurance company stating that this was at risk to lapse a long time ago and I
 16 had to pay out my pocket to keep it active...So I don’t think this is even a
 17 issue for our deal any more. Again I can send you another copy of this letter if
 18 you like.

19 (Fox Decl., Ex. 11.)

20 On February 28, 2014, Eshel Bar-Adon, Executive Vice President and Chief Legal
 21 Officer of BOFI, wrote a letter to Venzant demanding the immediate return of the \$15,000
 22 BOFI advanced to her along with 18% annual interest. This letter acknowledged that the
 23 BOFI Agreement had been cancelled. [Dkt. 30, Ex. D.]

24 VI. AUTHORITY

25 A. Summary judgment standard.

26 Fed. R. Civ. P. 56(c) states that summary judgment shall be rendered in the moving
 party's favor,

if the pleadings, the discovery and the disclosure materials on file, and any
 affidavits show that there is no genuine issue as to any material fact and that
 the movant is entitled to judgment as a matter of law.

1 The moving party is entitled to judgment as a matter of law when the nonmoving party
 2 fails to make a sufficient showing on an essential element of his case with respect to which he
 3 has the burden of proof. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). The Court
 4 must draw all reasonable inferences in favor of the nonmoving party. *Matsushita Elec. Indus.*
 5 *Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

6 The central issue is “whether the evidence presents a sufficient disagreement to
 7 require submission to a jury or whether it is so one-sided that one party must prevail as a
 8 matter of law.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 (1986). The moving
 9 party bears the initial burden of showing the district court “that there is an absence of
 10 evidence to support the nonmoving party’s case.” *Celotex Corp.*, 477 U.S. at 325. The
 11 moving party can carry its initial burden by producing affirmative evidence that negates an
 12 essential element of the nonmovant’s case, or by establishing that the nonmovant lacks the
 13 quantum of evidence needed to satisfy its burden of persuasion at trial. *Nissan Fire & Marine*
 14 *Ins. Co., Ltd. v. Fritz Cos., Inc.*, 210 F.3d 1099, 1102 (9th Cir. 2000). The burden then shifts
 15 to the nonmoving party to establish a genuine issue of material fact. *Matsushita Elec. Indus.*
 16 *Co.*, 475 U.S. at 585-87.

17 In supporting a factual position, a party must “cit[e] to particular parts of materials in
 18 the record . . . ; or show[] that the materials cited do not establish the absence or presence of a
 19 genuine dispute, or that an adverse party cannot produce admissible evidence to support the
 20 fact.” Fed. R. Civ. P. 56(c)(1). The nonmoving party “must do more than simply show that
 21 there is some metaphysical doubt as to the material facts.” *Matsushita Elec. Indus. Co.*, 475
 22 U.S. at 585. “[T]he requirement is that there be no *genuine* issue of material fact. . . . Only
 23 disputes over facts that might affect the outcome of the suit under the governing law will
 24 properly preclude the entry of summary judgment.” *Anderson*, 477 U.S. at 247-48 (emphasis
 25 in original). Also, “[t]he mere existence of a scintilla of evidence in support of the non-
 26 moving party’s position is not sufficient[]” to defeat summary judgment. *Triton Energy*

1 *Corp. v. Square D Co.*, 68 F.3d 1216, 1221 (9th Cir. 1995). Likewise, the nonmoving party
 2 “cannot defeat summary judgment with allegations in the complaint, or with unsupported
 3 conjecture or conclusory statements.” *Hernandez v. Spacelabs Med. Inc.*, 343 F.3d 1107,
 4 1112 (9th Cir. 2003).

5 **B. There are no material facts in dispute regarding defects in Plaintiff’s tortious**
 6 **interference claim.**

- 7 1. Tortious interference requires knowledge of the existence of a valid and
 8 enforceable contract, and intentional interference by improper purpose or
means.¹

9 The elements of a tortious interference claim are well established. The Plaintiff must
 10 prove a valid contract; that Defendants had knowledge; that the Defendants interfered causing
 11 termination of the contract by improper purpose or means; and resultant damages. *Kane v.*
 12 *City of Bainbridge Island*, 866 F. Supp.2d 1254, 1265 (W.D. Wash. 2011); *Point Ruston, LLC*
 13 *v. Pac. Northwest Reg’l Council*, 658 F. Supp.2d 1266, 1275 (W.D. Wash. 2009) *citing*
 14 *Eggster v. City of Spokane*, 121 Wash. App. 799, 811, 91 P.3d 117 (2004).

15 In particular, tortious interference requires proof that the Defendants intentionally
 16 interfered causing the termination of the contract, for an improper purpose or by improper
 17 means. *National City Bank v. Prime Lending*, 737 F. Supp.2d 1257 (E.D. Wash. 2010);
 18 *Pleas v. City of Seattle*, 112 Wash.2d 794, 774 P.2d 1158 (1989). In this case, Plaintiff has
 19 not and cannot establish that the Defendants had prior knowledge of the BOFI Agreement or
 20 that they induced Ms. Venzant to cancel the arrangement.

21 The facts unequivocally demonstrate that, after nearly a year of waiting to receive her
 22 lump sum payment, Ms. Venzant became unhappy and frustrated with BOFI and elected to
 23 voluntarily cancel the BOFI Agreement. [Dkt. 30.] Ms. Venzant’s decision to cancel the
 24 BOFI Agreement was based on her own judgment in consultation with Mr. Onwubere, the

25 _____
 26 ¹ Although, for purposes of the Motion, only two elements of the cause of action are discussed, Defendants are
 not waiving and specifically reserve the right to challenge each and every element of the claim.

1 former sales representative for the Plaintiff. [Dkt. 30.] There is no evidence that Ms. Venzant
2 was encouraged or induced to cancel the contract by anyone employed by or acting on behalf
3 of the Defendants or Advance Funding. *Id.*

4 Ms. Venzant did not even contact Advance Funding until several months after she
5 canceled the BOFI Agreement regarding the possibility of a new transfer. [Dkt. 30.] At that
6 time, she produced proof that she had canceled the BOFI Agreement and therefore Advance
7 Funding was free to proceed. [Dkt. 30, Exhibit C.] Advance Funding conducted an
8 investigation and confirmed that BOFI had not obtained the assigned payments: no petition
9 had been filed; no Court Order obtained; and no authorization from the Lottery Commission.
10 Even if Advance Funding had subsequently been made aware of the BOFI Agreement, such
11 knowledge was after Ms. Venzant's cancellation of the Agreement. There is no evidence that
12 Advance Funding, or anyone acting on its behalf, interfered with the agreement or induced
13 Ms. Venzant to cancel. Ms. Venzant's decision to cancel occurred many months before
14 Advance Funding was ever contacted.

15 Moreover, there is absolutely no legal basis for a tortious interference claim against
16 SCS or Tovey. Neither SCS nor Tovey had any contact with Ms. Venzant. SCS did not even
17 know the name of the lottery winner until it received the closing binder, which was well after
18 Ms. Venzant sent the cancellation letter to BOFI; after she entered into a transfer agreement
19 with Advance Funding; and after the Court had approved the transfer. Neither SCS nor
20 Tovey had any prior knowledge of the BOFI Agreement and there is no evidence that they
21 intentionally interfered.

22 Even if this Court were to find that Advance Funding interfered (which should be
23 unlikely) there is still no legal basis for imposing liability as against SCS or Tovey. They had
24 no direct involvement and were not agents or employees of Advance Funding.

C. When the tortious interference claim is dismissed, the remaining claims for unjust enrichment and for declaratory relief are unsustainable.

Dismissal of Plaintiff's tortious interference claim necessarily requires dismissal of the unjust enrichment and declaratory judgment claims because those claims are predicated on a finding of tortious interference to sustain a cause of action. The elements necessary for unjust enrichment and declaratory judgment cannot be established if the tortious interference claim is dismissed.

1. Unjust enrichment cannot stand where BOFI did not confer a benefit on Defendants.

BOFI's unjust enrichment claim is deficient for two reasons. First, BOFI did not confer a benefit on the Defendants, and second, Defendants' conduct was not wrongful or inequitable.

"Three elements must be established in order to sustain the claim based on unjust enrichment: a benefit conferred upon the defendant by the plaintiffs; an appreciation or knowledge by the defendant of the benefit; and the acceptance or retention by the defendant of the benefit under such circumstances as to make it unequitable for the defendant to retain the benefit without the payment of its value." *Baillie Communications Limited v. Trend Business Systems, Inc.*, 61 Wash. App 151, 159-60, 810 P.2d 112 (1991) quoting Black's Law Dictionary, Sixth Edition, 1990; *Young v. Young*, 164 Wash. 2d 477, 484, 191 P.3d 1258 (2008). Here, Plaintiff cannot establish facts to support any element.

BOFI alleges that Ms. Venzant's future lottery payments were the benefit the Defendants wrongfully obtained.² This argument is specious because BOFI did not own or control Ms. Venzant's future lottery payments, and therefore could not have "conferred" them on the Defendants. At most, the BOFI Agreement was an inchoate contract for the lottery

² Plaintiff claims "[t]he vast majority of the value [Defendants] received belonged to BOFI, as the BOFI Agreement and Addendum covered the vast majority of the same payments that Ms. Venzant assigned to Advance Funding." [Dkt. 1, pg. 6:14-16.]

1 payments. In fact, the BOFI Agreement, was expressly conditioned on obtaining a final and
 2 nonappealable Court Order and a written acknowledgment from the Lottery Commission –
 3 neither of which event ever happened. Unless and until the Court authorized the assignment,
 4 BOFI did not own or control the future payments. Whether BOFI could ultimately sue
 5 Ms. Venzant for breach of the BOFI Agreement is beside the point. Without approval from
 6 the Court, BOFI did not own or control the lottery payments – and therefore did not confer
 7 anything for the benefit of the Defendants.

8 In this case, Ms. Venzant (who *did* own and control the payments) assigned a portion
 9 of her future lottery payments to Advance Funding. In the Court Order issued by the
 10 Thurston County Superior Court, the Court authorized the transfer of the lottery payments
 11 from Ms. Venzant to Advance Funding, and then approved the assignment of those payments
 12 from Advance Funding to the Trust. (Fox Decl., Ex. 12.) To the extent that the Trust
 13 received a benefit, it came as a result of the assignment from Advance Funding.³ For its part,
 14 SCS, simply acted as an intermediary and received none of the lottery payments.

15 Plaintiff cannot establish unjust enrichment for something conferred on the
 16 Defendants by a third party.

17 2. There is no wrongful or unjust act.

18 No facts support the assertion that Advance Funding's contract with Ms. Venzant was
 19 wrongful or inequitable. One of the three distinct elements of an unjust enrichment claim is
 20 that the Defendants' acceptance or retention of some benefit is inequitable and wrongful.
 21 *Lynch v. Deaconess Medical Center*, 113 Wn. 2d, 162, 165, 776 P.2d, 681 (1989) (“[t]he
 22 enrichment of the defendant must be unjust.”).

23
 24
 25 ³ In any event, the Trust acquired the lottery payments as part of a transaction whereby it provided the funding
 26 for the purchase price to Ms. Venzant. Other than a few measly advances, BOFI never paid Ms. Venzant the
 promised lump sum.

1 The entire basis for the unjust enrichment claim is the assertion that Defendants
 2 tortiously interfered with BOFI's agreement. As set forth above, there is no factual basis for
 3 the tortious interference claim against Advance Funding. But even if there was such a claim
 4 as to Advance Funding, there is no similar liability as to SCS, Mr. Tovey, or the Trust. SCS
 5 and the Trust had no contact with Ms. Venzant and were not even aware of her name until
 6 after the Court had already approved the assignment. There is no basis for finding wrongful
 7 or inequitable conduct.

8 The Plaintiff cannot sustain the unjust enrichment claim where it had no right to
 9 Ms. Venzant's payments and it did not "confer" anything of value on the Defendants. The
 10 unjust enrichment claim should be dismissed.

11 **D. The Court has no authority to grant the request for declaratory relief.**

12 Styled as a request for declaratory relief, BOFI is essentially seeking to have this
 13 Court undo a lawfully entered Order from the Thurston County Superior Court, and award it
 14 Ms. Venzant's future lottery stream payments. BOFI did not intervene in the Thurston
 15 County action, or challenge the Order in that venue. Moreover, Ms. Venzant, whose future
 16 payments are at issue, was never made a party to this action. This Court may not, and should
 17 not, reverse the Order of a State Superior Court Judge, on a matter of purely State statutory
 18 law.

19 Federal district courts possess no power to review or modify state court decisions.
 20 *Confederated Tribes of Colville Reservation v. Superior Court of Okanogan Cty.*, 945 F.2d
 21 1138, 1141 (9th Cir. 1991); *Atlantic Coast Line R.R. v. Locomotive Engineers*, 398 U.S. 281,
 22 296, 90 S.Ct. 1739, 1748, 26 L.Ed.2d 234 (1970). The federal courts must give the same
 23 preclusive effect to a state court judgment as the state courts of that state would themselves
 24 give to that judgment. 28 U.S.C. § 1738. "Due in no small part to the fundamental
 25 constitutional independence of the States, Congress adopted a general policy under which
 26

1 state proceedings ‘should normally be allowed to continue unimpaired by intervention of the
 2 lower federal courts, with relief from error, if any, through the state appellate courts and
 3 ultimately [the Supreme] Court.’” *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 145–46,
 4 108 S. Ct. 1684, 1689, 100 L. Ed. 2d 127 (1988) citing *Atlantic Coast Line R. Co.*, 398 U.S. at
 5 287.

6 A party may not obtain an injunction in federal district court against the enforcement
 7 of a state court order. *Atlantic Coast Line R. Co.* 398 U.S. at 287. “A court of the United
 8 States may not grant an injunction to stay proceedings in a State court except as expressly
 9 authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or
 10 effectuate its judgments.” 28 U.S.C. § 2283. Relief from a state court order may be sought in
 11 state court or, if the final decision of the highest state court is adverse, then in the US
 12 Supreme Court, but relief from a state court order cannot be obtained in a US District Court.
 13 *Colville Tribes*, 945 F.2d at 1142.

14 In its claim for declaratory relief, BOFI actually seeks an injunction, in that it asks this
 15 Court to vacate and set aside the Thurston County Superior Court’s order. (*See, e.g. Nken v.*
 16 *Holder*, 556 U.S. 418, 428, 129 S. Ct. 1749, 1758, 173 L. Ed. 2d 550 (2009): injunction is
 17 “means by which a court tells someone what to do or not to do.”) BOFI offers no legal
 18 support for such relief, and indeed none exists: well-established case law precludes this Court
 19 from reviewing the actions of the Thurston County Superior Court, let alone vacating its
 20 orders. As the Eastern District of California held when faced with this same issue:

21 “It is clear that this court has no authority to grant the requested relief. The
 22 federal district court has no power to review the actions of the Shasta County
 23 Superior Court or to set aside its orders. Our Constitution contemplates a dual
 24 system of federal and state courts, which cannot function if federal courts
 25 intervene in state judicial proceedings. The state courts are constitutionally
 26 entitled to independence. ...Absent a specific constitutional or statutory grant
 of authority, which is absent here, this court simply has no authority to
 invalidate state court orders.”

1 *Sharma v. City of Redding*, unreported, No. 217CV00487MCEACPS, 2017 WL 2610064, at
 2 *2 (E.D. Cal. June 16, 2017), order amended and superseded, No. 217CV00487MCEACPS,
 3 2017 WL 2972263 (E.D. Cal. July 12, 2017)(emphasis added), citing *Chick Kam Choo v.*
 4 *Exxon Corp.*, 486 U.S. 140, 145–46, 108 S. Ct. 1684, 1689, 100 L. Ed. 2d 127 (1988).

5 BOFI's remedy, should it prevail and establish damages, would be limited to monetary
 6 relief. It is not entitled to a declaratory judgment vacating the state court order, and thus the
 7 claim for a declaratory judgment should be dismissed.

8 CONCLUSION

9 Ms. Venzant canceled the BOFI Agreement months before entering into a new
 10 transaction with Advance Funding, and her decision was not based on any interference or
 11 urging from the Defendants.

12 No genuine issues of material fact exist and Defendants are entitled to judgment
 13 dismissing the Complaint.

14 DATED this 20th day of September, 2018.

15 RYAN, SWANSON & CLEVELAND, PLLC

16 By /s/ Susan Rae Fox

17 Susan Rae Fox, WSBA #15278
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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that on September 20, 2018, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system, and caused a copy of the foregoing document to be sent via electronic and U.S. Mail to the following attorneys of record:

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Attorneys for Plaintiff BofI Federal Bank

DATED this 20th day of September, 2018.

/s/ Susan Rae Fox

Susan Rae Fox, WSBA #15278
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The Honorable Barbara J. Rothstein

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

BOFI FEDERAL BANK, a federally chartered
banking institution,

Plaintiff,

v.

ADVANCE FUNDING LLC; KIRK A. TOVEY,
individually and as trustee of the KIRK A. TOVEY
REVOCABLE TRUST; and SETTLEMENT
COLLECTION SERVICE, LLC,

Defendants.

NO. 2:14-cv-00484-BJR

**[PROPOSED] ORDER GRANTING
DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT OF
DISMISSAL**

THIS MATTER came before this Court on the Defendants' Motion for Summary Judgment of Dismissal. The Court has considered the Motion for Summary Judgment, the Declaration of Susan Rae Fox, and the Declaration of Richard E. Miller III, and it is hereby

ORDERED that Defendants' Motion for Summary Judgment for Dismissal is GRANTED and the Complaint is DISMISSED effective upon entry of this order.

DATED this ____ day of October, 2018.

JUDGE BARBARA J. ROTHSTEIN
UNITED STATES DISTRICT JUDGE



1 Presented by:

2 

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